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Rational Basis with a Bite: A Retreat from the Constitutional Right to Travel

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Introduction

In June 1966, Vivian Marie Thompson, a nineteen year old single mother of one child and pregnant with her second, moved from Dorchester, Massachusetts to Hartford, Connecticut.[1] There, Vivian moved in with her mother.[2] However, her mother was not able to support Vivian and her child for very long, and in August 1966 Vivian moved into her own apartment in Hartford.[3] Her pregnancy precluded her from working or participating in a work training program, and so she was forced to file for Aid to Families with Dependent Children (AFDC) assistance.[4] In November, she was informed by the Connecticut Welfare Department that her application for AFDC had been denied.[5] The sole basis for the denial was that Vivian had not lived in Connecticut for one year before her application was filed.[6] Vivian's story, from the U.S. Supreme Court case *Shapiro v. Thompson*,[7] is one of thousands of stories of people impacted by durational residency requirements.[8]

Transcending political boundaries, welfare reform efforts

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* David A. Donahue, *Penalizing the Poor: Durational Residency Requirements for Welfare Benefits*, 72 ST. JOHN'S L. REV. 451, 464 (1998) (discussing the U.S. Supreme Court's retreat from traditional rational basis review in *Zobel v. Williams*, 457 U.S. 55 (1982)).

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1. *See* Shapiro v. Thompson, 394 U.S. 618, 623 (1969).
2. *See id.*
3. *See id.*
4. *See id.*
5. *See id.*
6. *See id.*
7. 394 U.S. 618 (1969).
8. *See* discussion *infra* Part I.

have created durational residency requirements,[9] which limit welfare benefits based on the length of a recipient's residence in a particular state.[10] While legislators have asserted numerous purposes for durational residency requirements,[11] one often unvoiced but apparent purpose is to discourage indigent persons from moving to a particular state.[12]

Although the Supreme Court in 1969 held that durational residency requirements are unconstitutional,[13] Congress effectively trumped that ruling with the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) in 1996, allowing states to impose certain types of durational residency requirements.[14] As states followed Congress' lead, enacting durational residency requirements for welfare benefits,[15] groups and individuals concerned with poverty issues and individuals dependent on welfare benefits once again raised the subject of durational residency requirements with the courts.[16] The Supreme Court most recently revisited the issue in *Saenz v. Roe*.[17]

This Article suggests that the Supreme Court's traditional approach to deciding durational residency requirements, while producing a sound moral outcome, is legally flawed and ultimately

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9. *See* Brenna Binns, *Fencing Out the Poor: The Constitutionality of Residency Requirements in Welfare Reform*, 1996 WIS. L. REV. 1255, 1258-60, 1270-71 (tracing the history of welfare in the United States and commenting on the bipartisan nature of welfare reform).

10. *See Shapiro*, 394 U.S. at 622-27 (describing the structure of durational residency requirements in Connecticut, the District of Columbia, and Pennsylvania, which denied new residents welfare benefits during their first year).

11. *See id.* at 628-38 (cataloguing the purported purposes for durational residency requirements in Connecticut, the District of Columbia and Pennsylvania); *infra* notes 35-40 and accompanying text (detailing the Supreme Court's analysis of how residency requirements infringe upon the fundamental right to travel).

12. *See* Binns, *supra* note 9, at 1271 ("This goal is based on the belief that the poor are motivated principally by higher benefits, and by fears that the state will be labeled a 'welfare magnet' should it continue to provide comprehensive public assistance.").

13. *See Shapiro*, 394 U.S. at 638 (holding that durational residency requirements that deny benefits unless applicants have resided in the state for one year are unconstitutional).

14. *See* 42 U.S.C. § 601 (1998); *infra* notes 101-103 and accompanying text (discussing a durational residency provision of PRWORA that allowed states to limit welfare benefits for the first year of a newcomer's residency to the amount they would have received in their prior state of residence).

15. *See* Binns, *supra* note 9, at 1270 ("Even before federal welfare reform won approval in August 1996, virtually every state had proposed welfare reform."); *infra* notes 108-113 and accompanying text (providing examples of such state legislation).

16. *See* discussion *infra* Part I.D.

17. 119 S.Ct. 1518 (1999).

does more to harm than good to strengthen welfare rights. Part I traces the history of durational residency requirement jurisprudence in the Supreme Court,[18] focusing especially on the landmark *Shapiro v. Thompson* case,[19] as well as the recently decided *Saenz* case.[20] Part I also examines the *Shapiro* progeny and the traditional basis for deciding durational residency requirement cases.[21] Part II analyzes the direction the Supreme Court has taken in its line of durational residency requirement opinions.[22] Finally, Part III proposes that the Court adopt a new approach to deciding durational residency requirement cases—abandon the constitutional right to travel, and turn from strict scrutiny to rational basis review.[23]

I. The History of Durational Residency Requirements

From the welfare rights movements of the 1960s and 1970s to the welfare reform of the 1990s, the question of how to distribute welfare benefits has loomed large in politicians' minds.[24] Discussions on the topic and attempts at reform have been fueled by many factors, including compassion, sympathy and loathing.[25] These discussions have created a fear that certain states will become "welfare magnets," hypothetical states whose welfare benefits are so attractive that they become a sort of promised land for indigent families.[26] While it is not clear that the phenomenon of "welfare magnets" actually exists,[27] the fear of becoming a

18. *See infra* notes 24-150 and accompanying text.

19. 394 U.S. 618 (1969).

20. 119 S.Ct. 1518 (1999).

21. *See infra* notes 63-100 and accompanying text.

22. *See infra* notes 151-198 and accompanying text.

23. *See infra* notes 199-241 and accompanying text.

24. *See* Opinion of the Justices to the House of Representatives, 257 N.E.2d 94 (Mass. 1970) (issuing advisory opinion counseling against enactment of a durational residency requirement in light of *Shapiro v. Thompson*, 394 U.S. 618 (1969); *see also* MINN. STAT. § 2565.12 (1997) (creating a post-welfare reform durational residency requirement).

25. *See* Patricia Edmonds, *States Turn Values Rhetoric into Legislative Action*, USA TODAY, Aug. 8, 1996, at A7 (quoting Tommy Thompson, Governor of Wisconsin, saying that welfare reform law "set[s] a moral tone for our society"); *see also* Matthew Adler, *What States Owe Outsiders*, 20 HASTINGS CONST. L.Q. 391, 391-93 (1993) (rejecting what he terms the "parochialist" viewpoint that states should give zero weight to the well being of non-residents).

26. *See* Paul E. Peterson, *Devolution's Price*, 14 YALE J. ON REG. 111, 116-17 (1996) (defining welfare magnets as "places that attract poor people because they offer higher cash benefits than other states").

27. *See* Institute for Research on Poverty, University of Wisconsin, *Urban Immigration: State of Wisconsin and Dane County* 1-7 (1991) (concluding from statistical data on welfare migration that higher welfare benefits did not translate

welfare magnet led states to create durational residency requirements to keep indigent newcomers off the welfare rolls for some set period of time after they moved into a new state.[28] The durational residency requirements, however, were not met placidly by all newcomers, and the first round of legal challenges emerged in the 1960s.[29]

A. Shapiro v. Thompson

In 1969, statutes from Connecticut, the District of Columbia and Pennsylvania denied welfare benefits to any person who had lived in the state or district for less than one year before applying for welfare.[30] The U.S. Supreme Court in *Shapiro* held that these durational residency requirements for receipt of welfare benefits were unconstitutional.[31] The Court struck down the statutes for two reasons. First, the Court attacked the residency requirements on equal protection grounds.[32] The requirements, it held, created two classes of indigent families: indigent families who had lived in the state for a year or more, and indigent families who had lived in the state for less than a year.[33] The Court ruled that such a distinction was impermissible.[34]

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into more welfare applicants moving into a state); *see also* Gary Blair, *Suit Alleges Minnesota Residency Requirements for Welfare Eligibility Unconstitutional*, OJIBWE NEWS, Oct. 17, 1997, at 1 ("[C]onclusions of several studies indicate people come to Minnesota mostly for reasons that have nothing to do with welfare. 'They come for jobs, they come to join family, they come to escape domestic abuse, or they come for better schools.'"). *But see* PAUL E. PETERSON ET AL., WELFARE MAGNETS: A NEW CASE FOR A NATIONAL STANDARD (1990) (advocating the creation of a national welfare standard to combat the problem of welfare magnets).

28. *See* Binns, *supra* note 9, at 1257 ("Federal welfare reform that transfers responsibility for welfare administration to the states, state-level reforms aimed at reducing benefit eligibility, and public outcry over perceived welfare migration are strong arguments in favor of a state's interest in controlling the number of poor on the welfare rolls.").

29. *See* Shapiro v. Thompson, 394 U.S. 618 (1969) (holding unconstitutional durational residency requirements denying welfare benefits to indigent newcomers for the first year they lived in a new state).

30. *See id.* at 622-23 (describing the Connecticut durational residency requirement); *id.* at 623-25 (describing the District of Columbia requirement); *id.* at 625-26 (describing the Pennsylvania requirement).

31. *See id.* at 638 (holding that durational residency requirements violate the Equal Protection Clause and the constitutional right to travel).

32. *See id.* at 633 (finding that the Equal Protection Clause prohibits an "apportionment of state services" between newer and older residents).

33. *See id.* at 627 (rejecting this distinction as a permissible basis for the state's requirements).

34. *See id.* at 632 ("We have difficulty seeing how long-term residents who qualify for welfare are making a greater present contribution to the State in taxes than indigent residents who have recently arrived.").

Second, the Court examined the constitutional right to travel.[35] The question was whether durational residency requirements for welfare benefits impermissibly burdened this right.[36] The Court classified the right to travel as a fundamental right[37] and pointed to the right's long history in American jurisprudence.[38] The Court held that indigent families moving from state to state were exercising their constitutional right to travel.[39] Because the right to travel is a fundamental right, the Court applied strict scrutiny to the Connecticut, District of Columbia, and Pennsylvania durational residency requirement statutes to determine whether they violated the Equal Protection Clause of the Fourteenth Amendment.[40]

Under strict scrutiny, the states had to show that the durational residency requirements furthered a compelling state interest.[41] The Court quickly struck down statutes with durational residency requirements designed to curb state funds for welfare benefits, or to deter indigent families from moving into a state.[42] The states in *Shapiro* then offered four alternative justifications:[43] (1) that the durational residency requirements allow the states to predict and plan for their welfare budgets;[44] (2) that the requirements give decision-makers an objective standard

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35. *See id.* at 634.

36. *See id.* (setting forth the test that a classification which penalizes the right to travel is unconstitutional if it does not serve a compelling state interest).

37. *See* BLACKS' LAW DICTIONARY 465 (6th ed. 1991):

> [Fundamental rights are t]hose rights which have their source, and are explicitly or implicitly guaranteed, in the federal Constitution and state constitutions. . . . Challenged legislation that significantly burdens a 'fundamental right' . . . will be reviewed under a stricter standard of review. A law will be held violative of the due process clause if it is not closely tailored to promote a compelling or overriding interest of government.

38. *See Shapiro*, 394 U.S. at 630 (quoting the Passenger Cases, 7 How. 283, 492 (1849)). The Court stated that:

> for all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.

Id.

39. *See id.* at 634 ("[I]n moving from State to State or to the District of Columbia [the indigent persons] were exercising a constitutional right[.]").

40. *See id.* at 638 (determining the constitutionality of durational residency requirements by whether or not they promote a compelling state interest).

41. *See id.*

42. *See id.* at 633 (finding that these were not constitutionally permissible state purposes).

43. *See id.* at 633-34.

44. *See id.*

by which to judge whether someone is a qualified resident;[45] (3) that the requirements significantly reduce the possibility for fraud;[46] and (4) that denying welfare benefits for one year upon entering the state provides an incentive for new residents to enter the workforce.[47] The Court struck down each of these rationales.[48]

In response to the argument that states needed durational residency requirements to plan yearly budgets, the Court pointed out that neither Connecticut, the District of Columbia nor Pennsylvania had shown any evidence that they actually used the durational residency requirements for this purpose.[49] Furthermore, the Court found it highly unlikely that any state would actually go to the lengths necessary to utilize durational residency requirements in this way.[50] Thus, the Court held that the states could not use budgetary concerns as their "compelling interest."[51]

Using durational residency requirements to determine bona fide residency was, in the Court's view, simply illogical-the two were completely distinct concepts.[52] Less drastic means than durational residency requirements existed for preventing fraudulent receipt of benefits from more than one state.[53] And if providing incentives to enter the workforce was the goal of durational residency requirements, then the states should institute a one-year waiting period for *any* person who applied for welfare, newcomer or not.[54] Since the states were not able to

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45. *See id.*

46. *See id.* (discarding the states' reasoning that if indigent persons were allowed to move from state to state and collect full benefits at will, the frequency of fraud through collection of double payments would be high).

47. *See id.*

48. *See id.* at 634-35 (striking down budget predictability justification); *id.* at 636 (striking down objective residency standard justification); *id.* at 637 (rejecting prevention of fraudulent benefits receipt justification and justification of encouraging new residents to join the work force).

49. *See id.* at 634 ("The records in all three cases are utterly devoid of evidence that either State or the District of Columbia in fact uses the one-year requirement as a means to predict the number of people who will require assistance in the budget year.").

50. *See id.* at 635 (pointing to other methods of determining budgetary needs which the states themselves conceded would be more accurate than the durational residency requirements).

51. *See id.* at 634 (finding this proffered justification "wholly unfounded").

52. *See id.* at 636 (remarking that bona-fide residency and living in a state for one year were not the same thing).

53. *See id.* at 637 (suggesting alternatives such as cooperation among different states' welfare departments).

54. *See id.* (positing that if the states really wanted to encourage participation in the labor force, they would impose a one-year waiting period on any new

advance any interest which could be accepted as compelling, the Court found that the durational residency requirements did not meet strict scrutiny and must be struck down.[55] The Court also said that none of these state interests would satisfy even a traditional rational basis review, but that strict scrutiny was nonetheless the correct standard to apply since the fundamental right to interstate travel was involved.[56] The Court also implied that not all durational residency requirements would constitute an impermissible penalty on the right to travel.[57]

Perhaps most significant for the current situation, the *Shapiro* Court commented on the federal government's role in durational residency requirements.[58] In *Shapiro*, the states argued that durational residency requirements should be permissible because Congress had included a provision regarding waiting periods in AFDC legislation.[59] The Court, however, found this a weak argument.[60] First, the Court ruled that Congress had not called for durational residency requirements in its legislation.[61] Second, the Court clarified that even if Congress had

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applicant for welfare, regardless of how long they had lived in the state).

55. *See id.* at 638 (finding that the durational residency requirements did not withstand strict scrutiny).

56. *See id.* ("[E]ven under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the State for one year would seem irrational and unconstitutional.").

57. *See id.* at 638. The Court stated in a footnote as follows:

> We imply no view of the validity of waiting-period or residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel.

Id. at 638 n.21. The Court did, however, address some of these other areas in later cases. *See infra* notes 64-95 and accompanying text.

58. *See Shapiro*, 394 U.S. at 638-41.

59. *See id.* at 638 (turning to Connecticut and Pennsylvania's argument that their actions were sanctioned by Congress); *see also* Social Security Act of 1935, 42 U.S.C. § 602(b) (1994) (current version at 42 U.S.C. § 607 (Supp. IV 1998)). The Act reads in pertinent part:

> The Secretary shall approve any [state assistance] plan which fulfills the conditions specified . . . except that he shall not approve any plan which imposes as a condition of eligibility for aid to families with dependent children, a residence requirement which denies aid with respect to any child residing in the State (1) who has resided in the State for one year immediately preceding the application for such aid . . . .

42 U.S.C. § 602(b). AFDC, which is what the Court dealt with in *Shapiro*, has been replaced by the PRWORA. *See* 42 U.S.C. § 607.

60. *See Shapiro*, 394 U.S. at 639-41 (noting that states cannot merely hide behind Congress to justify their actions).

61. *See id.* at 639 ("On its face, the statute does not approve, much less prescribe, a one-year requirement. It merely directs the Secretary of Health,

done so, the mere fact that Congress has created legislation does not redeem an otherwise unconstitutional penalty on a constitutional right.[62]

B. Durational Residency Requirements and the Right to Travel Post-Shapiro

Shapiro was not the first case in which the Supreme Court addressed the right to interstate travel or residency requirements[63]—nor was it to be the last. Between *Shapiro* and welfare reform in 1996, the Supreme Court dealt with durational residency requirements and the constitutional right to travel on seven occasions.[64]

Three years after *Shapiro*, the Supreme Court began to address additional areas in which durational residency requirements might be used.[65] In *Dunn v. Blumstein*,[66] the Court found that in determining whether a law violates the Equal Protection Clause, one of two standards of review may be used, depending on the nature of the right affected.[67] The Court reaffirmed that the right to travel was a fundamental right and

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Education, and Welfare not to disapprove plans submitted by the States because they include such a requirement.").

62. *See id.* at 641 ("Congress may not authorize the States to violate the Equal Protection Clause.").

63. *See, e.g.*, United States v. Guest, 383 U.S. 745, 757-60 (1966) (finding actions against Black travelers constituted conspiracy to violate their fundamental right to travel).

64. *See* Anderson v. Green, 513 U.S. 557 (1995); Attorney General of New York v. Soto-Lopez, 476 U.S. 898 (1986); Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985); Zobel v. Williams, 457 U.S. 55 (1982); Sosna v. Iowa, 419 U.S. 393 (1975); Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972); *see also infra* notes 65-100 and accompanying text (discussing the holding of each case). This Article, however, omits discussion of durational residency requirement cases involving in-state tuition for higher education or bona fide residency requirements. For a discussion of these cases, see Donahue, *supra* note *.

65. These included areas on which the Court had declined to comment in *Shapiro*. *See supra* note 54 and accompanying text (rejecting the argument that the state's durational residency requirements were to encourage participation in the labor force).

66. 405 U.S. 330 (1972) (holding that a Tennessee law requiring individuals to live in the state for one year and a particular county for three months before being eligible to vote in state, county and local elections violated the Equal Protection Clause of the Fourteenth Amendment).

67. *See id.* at 335 (recognizing that the Court has created more than one standard of review for Equal Protection cases, depending upon "the interest affected or the classification involved"). If the right in question is a fundamental right, then strict scrutiny should be applied; if the right is not a fundamental right, then rational basis review is the appropriate standard. *See id.* at 335 n.6 (citing cases that have made the distinction).

applied strict scrutiny.[68]

The *Dunn* Court interpreted *Shapiro* as saying that *actual* deterrence of travel was not necessary to implicate the fundamental right.[69] All that was needed, the Court reasoned, was a showing that the requirements placed an impermissible penalty on the constitutional right to interstate travel.[70] In other words, to trigger strict scrutiny, the durational residency requirements needed only to be *capable of* deterring travel; there need not be any proof that they actually *did* deter travel.[71]

The Court next considered an Arizona statute that imposed a durational residency requirement on free non-emergency medical care.[72] In *Memorial Hospital v. Maricopa County*,[73] the Court once again applied strict scrutiny[74] and struck down Arizona's durational residency requirement.[75] Determining whether the durational residency requirement constituted a penalty on the

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68. *See id.* at 335 (concluding that Tennessee must show a compelling state interest in maintaining its durational residency requirements). The Court also noted:

> [B]ecause a durational residence requirement for voting "operates to penalize those persons, and only those persons, who have exercised their constitutional right of interstate migration . . . , [it] may withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest."

Id. at 340-41.

69. *See id.* at 339-40 (specifying that the *Shapiro* decision did not require that denial of welfare actually deter travel in order for it to be unconstitutional). The *Dunn* court also recognized that earlier cases had similarly lacked such a requirement. *See id.* at 340 n.9 (citing Crandall v. Nevada, 6 Wall. 35 (1868)).

70. *See id.* at 340 ("In *Shapiro* we explicitly stated that the compelling-state-interest test would be triggered by 'any classification which serves to *penalize* the exercise of that right [to travel.]'"); *see also* Shapiro v. Thompson, 394 U.S. 618, 634 (1969) ("[I]n moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional."); *id.* at 650 ("Not only is this burden of uncertain degree, but appellees themselves assert there is evidence that few welfare recipients have in fact been deterred [from traveling or migrating interstate] by residence requirements.").

71. *See Dunn*, 405 U.S. at 340 ("[T]he majority [in *Shapiro*] found no need to dispute the 'evidence that few welfare recipients have in fact been deterred (from moving) by residence requirements' . . . . Indeed, none of the litigants had themselves been deterred.").

72. *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (striking down Arizona's durational residency requirement, which required that indigent individuals live in the state for one year before they could receive nonemergency medical assistance at county hospitals).

73. 415 U.S. 250 (1974).

74. *See id.* at 254 (requiring that Arizona's durational residency requirement be justified by a compelling state interest).

75. *See id.* at 269 (ruling that the state did not meet its burden of justification).

constitutional right to interstate travel, the *Memorial Hospital* Court returned to the reasoning in *Shapiro* that certain basic necessities of life cannot be disturbed: "Whatever the ultimate parameters of the *Shapiro* penalty analysis, it is at least clear that medical care is as much 'a basic necessity of life' to an indigent as welfare assistance."[76]

The first case after *Shapiro* in which the U.S. Supreme Court upheld a durational residency requirement was *Sosna v. Iowa*.[77] *Sosna* and the cases that followed it involved durational residency requirements that limited services other than welfare benefits.[78] *Sosna* is of particular interest for two reasons. First, the majority pointed out that neither *Shapiro* nor its progeny ruled that there could never be a constitutional durational residency requirement.[79] In addition, the majority distinguished *Sosna* from earlier cases where the states tried to use budgetary concerns as their justification for the durational residency requirements.[80] Here, said the *Sosna* Court, there was no such fiscal concern.[81] Second, the Court was ambiguous as to which standard of review it used.[82] Without explicitly committing to either strict scrutiny or rational basis review, the Court ruled that Iowa's divorce residency requirement was based on "reasonable" state interests and was, therefore, constitutional.[83]

The next durational residency case the Court decided was *Zobel v. Williams*.[84] Here, the Court explicitly avoided a determination of which standard of review to apply.[85] The Court

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76. *Id.* at 259.

77. 419 U.S. 393 (1975) (upholding a state statute that required a year's residency before being able to obtain a divorce in state courts).

78. *See id.*

79. *See id.* at 406 ("[N]one of those cases intimated that the States might never impose durational residency requirements, and such a proposition was in fact expressly disclaimed.") (citing Shapiro v. Thompson, 394 U.S. 618, 638 (1969); *Memorial Hosp.*, 415 U.S. at 258).

80. *See Sosna*, 419 U.S. at 406 (distinguishing *Shapiro*, 394 U.S. 618; Dunn v. Blumstein, 405 U.S. 330 (1972); *Memorial Hosp.*, 415 U.S. 250).

81. *See id.* at 406 (recognizing that Iowa's durational residency requirement was not justified by budgetary concerns).

82. *See id.* at 410 (holding the Iowa statute "consistent with the provisions of the United States Constitution" without specifying a standard of review).

83. *See id.* at 406-07 (explaining that Iowa had a reasonable interest in imposing a durational residency requirement for the obtainment of divorce decrees because it neither wanted to impose on other states' interests in a particular divorce, nor expose divorces issued by its own state to challenges by other states).

84. 457 U.S. 55 (1982) (striking down an Alaska dividend distribution plan which disbursed proceeds from state oil rights to residents based on how long they had lived in the state without imposing a minimum length of residency).

85. *See id.* at 60-61 (discussing the two alternative standards of review for

simply stated that if the Alaska statute did not meet the minimal rationality test, it need not decide whether the statute must survive strict scrutiny.[86] Indeed, the Court found that the statute did not even satisfy the minimal rationality test,[87] and so Alaska's dividend distribution plan was struck down without determining the proper standard of review.[88]

Three years later, the Court mirrored *Zobel*'s ruling in *Hooper v. Bernalillo County Assessor*.[89] The Court avoided applying strict scrutiny as it had in *Zobel*[90] and evaded choosing between the standards of review, finding that New Mexico's durational residency requirement did not meet even the minimal rationality test.[91]

The Court was more explicit about its methods in *Attorney General of New York v. Soto-Lopez*.[92] The Court noted that it would apply strict scrutiny, regardless of whether the implicated statute satisfied minimal rationality.[93] The Court synthesized a number of previous rulings to formulate a three-part test for determining when a state law implicates the right to travel.[94] The new test stated that a state law implicates the right to travel "when it actually deters such travel . . . when impeding travel is its primary objective . . . or when it uses 'any classification which serves to penalize the existence of that right.'"[95]

Equal Protection analysis, but declining to choose one).

86. *See id.* ("[I]f the statutory scheme cannot pass even the minimal test . . . we need not decide whether any enhanced scrutiny is called for.").

87. *See id.* at 63-64 (holding that Alaska's purported justification for the dividend distribution plan, to reward residents' past contributions to the state, had been rejected in *Shapiro* and remained an impermissible justification).

88. *See id.* at 65 (holding that the Alaska statute violated the Equal Protection Clause).

89. 472 U.S. 612 (1985) (striking down a New Mexico statute which did not impose a threshold residency requirement, but rather provided a tax break to veterans of the Vietnam War who had resided in New Mexico prior to May 8, 1976).

90. *See id.* at 618 (declining to decide on a standard of review).

91. *See id.* at 621-22 (holding that the New Mexico statute's distinction between resident veterans was not rationally related to the asserted legislative goal).

92. 476 U.S. 898 (1986) (holding as unconstitutional a New York statute which gave special civil service preference to veterans who had become members of the military while residing in the state).

93. *See id.* at 905 n.4 ("Of course, regardless of the label we place on our analysis—right to migrate or equal protection—once we find a burden on the right to migrate the standard of review is the same. Laws which burden that right must be necessary to further a compelling state interest.").

94. *See id.* at 903 (citing Crandall v. Nevada, 6 Wall. 35, 46 (1868); Shapiro v. Thompson, 394 U.S. 618, 628-31 (1969); Zobel v. Williams, 457 U.S. 55, 62 (1982); Dunn v. Blumstein, 405 U.S. 330, 340 (1972)).

95. *Id.* at 903.

The next durational residency requirement case decided by the Supreme Court addressed welfare benefits once again.[96] *Anderson v. Green*[97] involved a California durational residency requirement limiting AFDC benefits for the first year of a newcomer's residency to the amount they would have received in their prior state of residence.[98] The case, however, was not decided on its merits.[99] Rather, the Court determined that the case was not ripe and dismissed it on that basis.[100] Major legislative changes in public assistance would occur before the Court would return to the issue of durational residency requirements for welfare benefits.

C. Congress Rebels Against Shapiro

Federal statutes governing welfare changed drastically in 1996 when Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA).[101] PRWORA did something that previous AFDC legislation did not—it gave permission to the individual states to impose durational residency requirements for the receipt of welfare benefits.[102] The language of PRWORA is explicit:

> A State operating a program funded under this part may apply to a family the rules (including benefit amounts) of the program funded under this part of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months.[103]

As one commentator recognized, "[i]nterestingly, there is no mention of *Shapiro*, or its progeny, in the legislative history of the Act."[104] The Supreme Court in *Shapiro* stated that Congress could

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96. *See* Anderson v. Green, 513 U.S. 557 (1995) (involving a California durational residency requirement which limited AFDC benefits).

97. 513 U.S. 557 (1995).

98. *See id.* at 557.

99. *See id.* at 560 (deciding the case without ruling on the constitutionality of the durational residency requirement).

100. *See id.* at 559. The Court explained as follows:

> After the Court of Appeals ruled in this case, it vacated the HHS [Secretary of Health and Human Services] waiver in a separate proceeding, concluding that the Secretary had not adequately considered objections to California's program. The Secretary did not seek this Court's review of the *Beno* decision. California acknowledges that even if it prevails here, the payment differential will not take effect.

Id.

101. 42 U.S.C. § 607 (Supp IV 1998).

102. *See supra* notes 58-62 and accompanying text (discussing Shapiro v. Thompson, 394 U.S. 618 (1969)).

103. 42 U.S.C. § 604(c) (Supp.III 1997).

104. Donahue, *supra* note *, at 474.

not, in essence, give the states permission to violate the Constitution.[105] As states rely on PRWORA in designing their welfare reform statutes, state courts are beginning to encounter the issue.[106] Nevertheless, with PRWORA in hand, states began re-designing their welfare policies.[107]

D. Rebellion Among the States

Close on the heels of Congress' PRWORA came the states' individual versions of welfare reform, many of which incorporated some sort of durational residency requirement.[108] Many variations were included among the new state welfare legislation. Durational residency requirements, modeled on PRWORA, limited new residents' welfare benefits for the first year to the amount of benefits they would have received in their previous states (if that amount was less than the amount they would receive in their new state).[109] Some states had requirements that denied certain benefits completely for the first year of residency.[110] There were also requirements that limited new residents' benefits for the first six months to a grant no greater than eighty percent of the benefits awarded longer-term residents,[111] as well as requirements

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105. *See supra* notes 58-62 and accompanying text (discussing *Shapiro*, 394 U.S. at 618).

106. *See infra* notes 114-141 and accompanying text (discussing allegiance among the courts).

107. *See infra* notes 108-113 and accompanying text.

108. *See, e.g.*, MINN. STAT. § 256J.12(3) (1997); MINN. STAT. § 256J.43 (1997); *see also* Maldonado v. Houstoun, 177 F.R.D. 311, 316-17 (E.D. Penn. 1997), *aff'd*, 157 F.3d 179 (3d Cir. 1998):

> The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 specifically authorizes states to treat interstate immigrants for one year under the welfare rules (including benefit amounts) of the states from which they moved. Thus, plaintiffs, here, do not seek to enjoin a statute which is an anomaly in the current reformation process but rather plaintiffs seek to enjoin and have declared unconstitutional a statute which many states and the national government believe is central to their current reform efforts.

Id. (citation omitted).

109. *See* Davis v. Doth, No. 62-C6-97-010231 (Minn. Dist. Ct., 2nd Dist. July 31, 1998) (enjoining enforcement of Minnesota durational residency requirement); Roe v. Anderson, 966 F. Supp. 977 (E.D. Calif. 1997), *aff'd*, 134 F.3d 1400 (1998) (holding that California's durational residency requirement was an impermissible penalty on the right to interstate travel and violated Equal Protection); *see also* Maldonado v. Houstoun, 177 F.R.D. 311 (E.D. Penn. 1997), *aff'd*, 157 F.3d 179 (3d Cir. 1998) (issuing a preliminary injunction against enforcement of Pennsylvania durational residency requirement).

110. *See* County of Niagara v. Shaffer, 607 N.Y.S.2d 466 (Sup. Ct. 1994) (holding county durational residency requirement inconsistent with state social services law).

111. *See* Aumick v. Bane, 612 N.Y.S.2d 766 (Sup. Ct. 1994) (striking down state

that reduced new residents' benefits by thirty percent for the first year.[112] Finally, some durational residency requirements denied new residents benefits for the first sixty days they resided in their new state.[113]

E. Allegiance Among the Courts

The constitutionality of several states' durational residency requirements was soon attacked at the state court level.[114] Prior to welfare reform, only one state court upheld a durational residency requirement for welfare benefits.[115] The courts that ruled on the issue post-PRWORA unanimously agreed that the newest wave of durational residency requirements was unconstitutional, notwithstanding PRWORA.[116]

The most recent durational residency requirement state court case, *Davis v. Doth*, was decided in Minnesota in July 1998.[117]

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statute that limited public assistance for new residents to the greater of either 80% of the full benefits package for similarly situated longer-term residents, or the standard benefits payment the applicant would have received in her previous state of residence).

112. *See* Westenfelder v. Ferguson, 998 F. Supp. 146 (D.R.I. 1998) (holding Rhode Island requirement unconstitutional).

113. *See* Warrick v. Snider, 2 F. Supp. 2d 720 (W.D. Penn. 1997) (finding that the Pennsylvania durational residency requirement did not meet the rational basis test). Note that the durational residency requirement struck down in Pennsylvania was almost identical to the one upheld in Wisconsin in 1992. *See* Jones v. Milwaukee County, 485 N.W.2d 21 (1992).

114. *See infra* notes 115-141 and accompanying text (discussing allegiance among the courts).

115. *See Jones*, 485 N.W.2d at 21 (upholding a 60-day waiting period for indigent newcomers to receive full welfare benefits).

116. *See infra* notes 117-127 and accompanying text (discussing *Davis v. Doth*).

117. *See* Davis v. Doth, No. 62-C6-97-010231 (Minn. Dist. Ct., 2nd Dist. July 31, 1998) (enjoining enforcement of durational residency requirement limiting new residents' welfare benefits for the first year to the amount of benefits they would have received in their previous states). It is interesting to note that Minnesota has two separate durational residency requirements; only one was litigated in the 1998 suit. *See id.* The remaining requirement is a "simple residency" requirement. *See id.* This requirement still stands:

> To be eligible for AFDC or MFIP-S, whichever is in effect, a family must have established residency in this state which means the family is present in the state and intends to remain here. . . . A family is considered to have established residency in this state only when a child or caregiver has resided in this state for at least 30 days with the intention of making the person's home here and not for any temporary purpose.

MINN. STAT. ANN. § 256J.12 (1997). The constitutionality of this provision was not litigated because the parties bringing the suit felt it was not unreasonable to allow the state (county, etc.) 30 days in which to process paperwork after the applicant had moved into the state. *See* Anne Quincy, Legal Aid Society of Minneapolis, Remarks at Meeting of Poverty Law Seminar, University of Minnesota Law School (Nov. 16, 1998).

This case is unique for two reasons. First, Minnesota is the only state court that has specifically denounced Congress' attempt to override the Supreme Court's previous rulings with PRWORA.[118] Second, the *Davis* court based its decision not only on *Shapiro* and its progeny, but also on a Minnesota Supreme Court case, *Mitchell v. Steffen*.[119]

Davis also affords an opportunity to take an anecdotal look at the effect durational residency requirements have on welfare recipients' lives. Consider the plight of Mary, one of the named plaintiffs in the Minnesota case.[120] Mary left Mississippi in the early 1990s, fleeing domestic abuse, and resettled in Minnesota.[121] She had lived in Minnesota for about five years when her abusive ex-husband finally learned of her whereabouts.[122] To keep her children from her ex-husband, Mary took them to her mother's home in Mississippi for the summer.[123] Meanwhile, Mary returned to Minnesota and essentially hid for three months.[124] During this time, she informed her social worker that her children were not with her for the summer, and to stop sending her assistance checks because of their absence.[125] At the end of the summer, Mary returned to her mother's home, picked up her children, and brought them back to Minnesota.[126] When she went to her welfare case worker to reinstate her and her children's benefits, she was told that the three months her children spent in Mississippi terminated her family's Minnesota residency, and that she would receive Mississippi benefits (approximately $300 less than Minnesota's benefits) for the next twelve months.[127]

Pennsylvania's recent cases also stand out in the mix of

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118. *See Davis*, No. 62-C6-97-010231, slip op. at 11 ("Congress' blessing does not shield the durational residency requirements from [strict scrutiny].").

119. 504 N.W.2d 198 (Minn. 1993) (holding unconstitutional a pre-PRWORA durational residency requirement which limited new residents' welfare benefits for the first six months they lived in Minnesota to sixty percent of the amount of benefits they would otherwise receive). For a critique of the approach taken in *Mitchell*, see Deborah K. McKnight, *Minnesota Rational Relation Test: The Lochner Monster in the 10,000 Lakes*, 10 WM. MITCHELL L. REV. 709 (1984) (arguing that the standard of review used in *Mitchell* is flawed). McKnight also criticizes the approach taken in *State v. Russell*, 477 N.W.2d 886 (Minn. 1991) (using "enhanced" rational basis review in dealing with state equal protection clause).

120. *See* Quincy, *supra* note 117.

121. *See id.*

122. *See id.*

123. *See id.*

124. *See id.*

125. *See id.*

126. *See id.*

127. *See id.*

durational residency requirement litigation.[128] In 1997, both the Eastern District and Western District Courts of Pennsylvania considered cases involving durational residency requirements.[129] In both cases, the courts explicitly chose to apply a rational basis test rather than the strict scrutiny applied by the *Shapiro* line of cases.[130] The Eastern District court in *Maldonado v. Houstoun*[131] noted a trend away from strict scrutiny in the more recent Supreme Court durational residency requirement cases.[132] The *Maldonado* court acknowledged that whatever its perception of recent Supreme Court holdings, it would have to apply the standard set forth in *Shapiro* if it determined that the durational residency requirement at issue constituted a penalty on the constitutional right to interstate travel.[133] However, the court found that a durational residency requirement that limits an indigent newcomer's cash benefits to the amount she would have received in her state of prior residence did *not* constitute a penalty on the right to travel, and hence did not trigger strict scrutiny.[134] Rather, the court applied a rational basis test to the two purposes Pennsylvania offered for its durational residency requirement: (1) to avoid becoming a "welfare magnet" for indigent persons; and (2) "to encourage employment, self-respect, and self-dependency among its welfare recipients."[135] Pennsylvania's durational residency requirement was not rationally related to either of these goals, ruled the court, and therefore violated the Equal Protection Clause of the Fourteenth Amendment.[136] Later in 1997, the

128. *See Maldonado*, 177 F.R.D. 311 (issuing preliminary injunction against enforcement of Pennsylvania's durational residency requirement); Warrick v. Snider, 2 F. Supp. 2d 720 (W.D. Penn. 1997) (finding that Pennsylvania's durational residency requirement did not meet even rational basis test).

129. *See id.*

130. *See Maldonado*, 177 F.R.D. at 331 (finding that durational residency requirement at issue did not constitute enough of a penalty on the right to travel to trigger strict scrutiny); *Warrick*, 2 F. Supp. 2d at 725 (finding that strict scrutiny was not applicable in the case at hand).

131. 177 F.R.D. 311.

132. *See id.* at 326 (noting that no Supreme Court majority has used strict scrutiny in a durational residency requirement case since Memorial Hospital v. Maricopa County).

133. *See id.* at 328 (acknowledging that *Shapiro*'s reasoning remained binding precedent for the lower courts).

134. *See id.* at 331 (reasoning that because indigent newcomers were denied only cash benefits, and still had access to food stamps, clothing banks, medical assistance, emergency assistance, and certain transportation assistance, that the durational residency requirement did not amount to a penalty on the right to travel).

135. *Id.* at 332.

136. *See id.* at 333 (holding that Pennsylvania's durational residency

United States District Court for the Western District of Pennsylvania adopted the *Maldonado* reasoning almost verbatim when it struck down a less stringent durational residency requirement which denied new residents benefits for the first sixty days they resided in the state.[137] The Third Circuit affirmed *Maldonado*'s holding, but it rejected the district court's reasoning.[138] The Third Circuit, like the *Shapiro* Court, held that strict scrutiny rather than rational basis review should have been used.[139] The circuit court further criticized the district court's attempt to identify and act upon a trend in recent Supreme Court cases.[140] However, the district court's use of rational basis review may still be instructive, especially in light of the circuit court's expressed reservations about the prudence of the Supreme Court's dependence on the constitutional right to travel.[141]

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requirement failed the rational relation test).

137. *See Warrick*, 2 F. Supp. 2d 720 (finding that Pennsylvania's durational residency requirement did not meet even a rational basis test). Pennsylvania is not the only state to strike down durational residency requirements using a rational basis test rather than strict scrutiny, although it is the only state to do so explicitly. In 1998, the United States District Court for the District of Rhode Island found that the reasons offered by the state for its durational residency requirement did not satisfy even a rational basis test, and so did not reach the question of whether strict scrutiny would be satisfied. *See* Westenfelder v. Fergusen, 998 F. Supp. 146 (D.R.I. 1998) (holding that the Rhode Island's durational residency requirement did constitute an impermissible penalty on the right to travel and was therefore subject to strict scrutiny, but that the requirement did not satisfy even a rational basis test).

138. *See* Maldonado v. Houstoun, 157 F.3d 179, 187 (3d Cir. 1998) ("[W]e are persuaded that the district court's 'penalty' analysis . . . misconstrued the import of the relevant case law and used an improper comparison.").

139. *See id.* at 190 (following the precedent of *Shapiro* and *Memorial Hospital*).

140. *See id.* at 186. The Court stated:

> This tendency . . . [of the Supreme Court to oscillate between rational basis and strict scrutiny] does not establish that rational basis is now the appropriate test when evaluating durational residency requirements as applied to welfare benefits. The Court in those cases merely employed its version of rational basis analysis because the challenged laws could not even survive rational basis review. Thus, the Court found it unnecessary to subject the laws to heightened scrutiny.

Id.

141. *See id.* at 185 ("Regrettably . . . the law with respect to the constitutional implications of the right to travel is unsettled and in need of clarification. The Court has at times subjected durational residence laws that impinge on the right to travel to strict scrutiny . . . and at other times to what appears to be some form of a heightened rational basis test."); *id.* at 190 ("*Because Shapiro and Maricopa County have never been overruled by the Court*, we follow the Court's directive and conclude that they dictate the result of this case.") (emphasis added).

F. The Court Affirms Shapiro

In 1997, the California case *Roe v. Anderson*[142] entered the durational residency requirement debate. California's breed of durational residency requirement for welfare benefits was common among the states: families who have lived in California for less than twelve months were to receive welfare benefits no greater than those they would have received in their state of prior residence.[143] The California system had previously been challenged, and the issue reached the Supreme Court in *Anderson v. Green*,[144] but the constitutionality of durational residency requirements was not resolved.[145]

The Supreme Court granted certiorari for *Roe* in September 1998,[146] and the case became *Saenz v. Roe*.[147] *Saenz* did not afford the Court the same escape from the ultimate issue as *Anderson* did,[148] primarily because it arose post-PRWORA and was therefore not subject to a waiver from the Secretary of Health and Human Services.[149] The case gave the Supreme Court an opportunity to reinforce, redefine, or reject its reasoning in its line of durational residency requirement cases. The Court chose to hold California's durational residency requirement statute unconstitutional, and reinforce the constitutional right to travel as the justification.[150]

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142. 966 F. Supp. 977 (E.D. Cal. 1997), *cert. granted sub nom.* Anderson v. Roe, 119 S.Ct. 31 (1998) (holding that California's durational residency requirement was an impermissible penalty on the right to interstate travel and violated Equal Protection).

143. *See supra* notes 108-113 and accompanying text (describing state durational residency requirements modeled after PRWORA).

144. *See* Anderson v. Green, 513 U.S. 557 (1995) (dismissing case for not being ripe).

145. *See id.* at 559 (finding that the parties had no live dispute). *See also supra* notes 97-100 and accompanying text.

146. *See* Anderson v. Roe, No. 98-97, 1998 WL 407156 (U.S.).

147. 119 S.Ct. 1518 (1999). *See also Justices To Tackle Census, Welfare Cases*, STAR TRIB. (Minneapolis), Oct. 4, 1998, at A11. For Supreme Court briefs see Brief for Petitioner, Anderson v. Roe, 1998 WL 784602; Brief for Respondent, Anderson v. Roe, 1998 WL 847469.

148. *See supra* note 100 and accompanying text.

149. *See Saenz v. Roe*, 119 S.Ct. 1518, 1522 (1999). *See* also Roe v. Anderson, 966 F. Supp. 977, 979 (E.D. Cal. 1997) ("The PRWORA significantly increased the states' discretion to design their federally supported welfare plans *without* seeking waivers from the Secretary." (emphasis added)).

150. *See Saenz*, 119 S.Ct. at 1524, 1528.

II. Approaches to Deciding Durational Residency Requirements Litigation

A. The Traditional Approach: The Constitutional Right to Travel and Its Inherent Weaknesses

"Americans show extraordinary ambivalence about mobility. It is at once treasured and feared: treasured as an attribute and enabler of personal autonomy, feared as a characteristic of the unpredictable and uncontrollable stranger."[151] Like the American public, the Supreme Court is conflicted about mobility, albeit in a different manner.[152] The *Shapiro* holding relies on the constitutional right to travel, or, perhaps more correctly, the constitutional right to interstate migration.[153] The right to travel has long been recognized,[154] but never well-defined,[155] by the Supreme Court. The *Shapiro* Court went so far as to explicitly state, "We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision."[156] The right, the Court said, was implicit:

> [The] right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.[157]

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151. Susan Bennett, *The Threat of the Wandering Poor: Welfare Parochialism and Its Impact on the Use of Housing Mobility as an Anti-Poverty Strategy*, 22 FORDHAM URB. L.J. 1207, 1209 (1995) (paraphrasing Lawrence M. Friedman, *Crimes of Mobility*, 43 STAN. L. REV. 637, 638 (1991)).

152. *See infra* notes 154-179 and accompanying text (describing the evolution and scope of a constitutionally-based right to travel).

153. *See supra* notes 36-40 and accompanying text (explaining the Court's rationale for finding a basic right to travel).

154. The Supreme Court first recognized a constitutional right to travel in *Crandall v. Nevada*, 73 U.S. 35, 49 (1867) (holding that imposition of a tax for passing through a state violated a constitutional right to travel). *See id.* ("We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States.").

155. *See* Matthew Poppe, *Defining the Scope of the Equal Protection Clause with Respect to Welfare Waiting Periods*, 61 U. CHI. L. REV. 291, 303 (1994) ("[T]he Supreme Court . . . has never achieved unanimity in deciding a right to travel case, nor has it applied the same approach in every case involving a durational residency requirement or similar law.").

156. Shapiro v. Thompson, 394 U.S. 618, 630 (1969).

157. *Id.* at 630-31 (quoting Justice Stewart's opinion in *United States v. Guest*, 383 U.S. 745, 757-58 (1966)).

This has been referred to as Justice Brennan's "structural approach," essentially that the very nature of the Constitution gives rise to a right to travel.[158] Many commentators have criticized the structural approach, asserting that implicit reference to a right to travel in the Constitution is not substantial enough to support such a broad right.[159]

Several other possible sources for a constitutional right to travel have been suggested and criticized over the years. Justice O'Connor has advocated for the Comity Clause (also known as Article Four's Privileges and Immunities Clause) as the foundation for the right.[160] This theory, advanced in her *Zobel v. Williams* concurrence,[161] has also been attacked:

> The main criticism of finding the source of the right to travel in the Comity Clause is that the Clause applies only to the right to travel, but not the right to interstate migration. Thus, the Clause protects a citizen of State *A* from being denied rights by State *B*, but does nothing for Citizen *A* when it is State *A* that denies him rights.[162]

A third possible source for the right to travel is the Privileges and Immunities Clause of the Fourteenth Amendment.[163] Commentators have also denounced this source, primarily because "the *Slaughter-House Cases* basically eviscerated this clause by holding that it only protected citizens from state interference with

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158. *See* Donahue, *supra* note *, at 468 (describing Justice Brennan's approach to the constitutional right to travel). Donahue goes on to point out that Brennan advanced his structural approach not only in *Shapiro*, but in *Zobel v. Williams* as well, stating, "the frequent attempts to assign the right to travel some textual source in the Constitution seem to me to have proved both inconclusive and unnecessary." *Id.* at 469 (quoting Zobel v. Williams, 457 U.S. 55, 66 (1982) (Brennan, J., concurring)).

159. *See, e.g.*, Gregory B. Hartch, *Wrong Turns: A Critique of the Supreme Court's Right to Travel Cases*, 21 WM. MITCHELL L. REV. 457, 476 (1995) ("While there is undoubtedly merit to the notion that some form of right to travel is implicit within the concept of a federal union, it is important to realize that this rationale falls far short of justifying the extremely broad right necessary to invalidate the statutes in *Soto-Lopez* and *Zobel*.").

160. *See Zobel*, 457 U.S. at 71 (O'Connor, J., concurring); *see also* U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

161. *See Zobel*, 457 U.S. at 73-74 (O'Connor, J., concurring) ("I would measure Alaska's scheme against the principles implementing the Privileges and Immunities Clause.").

162. Donahue, *supra* note *, at 469. Donahue is careful to include that "Justice O'Connor rejected this criticism, however, implying that it was merely a technical distinction." *Id.*

163. U.S. CONST. amend. XIV, § 1, cl. 2 ("[N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States[.]").

the privileges or immunities of national citizenship."[164] Welfare benefits are neither a privilege nor an immunity of national citizenship;[165] if they were, the *Shapiro* Court would not have had to base its decision on a fundamental right to travel.[166]

The *Saenz* Court addresses all three of these possible sources for a constitutional right to travel.[167] In its opinion, the Court refers to the possible sources as "components" of the right to travel:

> The 'right to travel'... embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.[168]

The first component, the Court reasons, does not apply to the case of durational residency requirements, and so there is no need to identify its constitutional source.[169] The Court is more willing to attach the second component to the Comity Clause, even though it finds that this component, too, has no bearing on the case at hand.[170] Finally, the Court settles on the Privileges and Immunities Clause of the Fourteenth Amendment, the purported birthplace of the third component of the right to travel, with which to strike down California's durational residency requirement for welfare benefits.[171] Despite significant criticism to the contrary,[172] the *Saenz* Court claims that couching a constitutional right to travel in the Fourteenth Amendment has always been "common ground."[173] For the Court to use such bold language regarding a right as contentious as the right to travel suggests that either it is

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164. Donahue, *supra* note *, at 470.

165. *See, e.g.*, Maldonado v. Houstoun, 177 F.R.D. 311, 323 (E.D. Pa. 1997) ("[T]here is no constitutional right to public welfare assistance . . . .").

166. *See* Shapiro v. Thompson, 394 U.S. 618, 634 (1969) ("[A]ny classification which serves to penalize the exercise of [a constitutional] right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional.").

167. *See* Saenz v. Roe, 119 S.Ct. 1518, 1525 (1999).

168. *Id.*

169. *See id.*

170. *See id.* at 1526.

171. *See id.*

172. *See supra* notes 161-164 and accompanying text.

173. *Saenz*, 119 S.Ct. at 1526 ("Despite fundamentally differing views concerning the coverage of the Privileges or Immunities Clause of the Fourteenth Amendment, most notably expressed in the majority and dissenting opinions in the *Slaughter-House Cases*... it has always been common ground that this Clause protects the third component of the right to travel.").

not aware of the difficulties surrounding the right, or, more plausibly, it is well aware of the difficulties and wishes to downplay them.

There is at least one other theory on the origins of a constitutional right to travel, though it is less often discussed. This theory focuses on the Citizenship Clause of the Fourteenth Amendment.[174] Interestingly, Justice Brennan, the same Justice who criticized attempts to ground the right to travel in any specific constitutional clause,[175] has also been the main shepherd of the Citizenship Clause theory.[176] Aside from Justice Brennan, however, this theory has not been thoroughly discussed.[177]

Finally, while no Supreme Court Justice has sponsored such a position, there has been scholarly support for a moral justification for the right to travel.[178] But this justification has been largely discarded, even by the very scholar who suggested it.[179]

B. Alternative Approaches: Subsidization Analogies

A unique approach proffered by Michael Hartmann is instructive in considering other dangers in using the constitutional

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174. U.S. CONST. amend. XIV, § 1, cl. 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

175. *See supra* notes 156-158 and accompanying text (describing Justice Brennan's structural approach to finding a constitutional basis supporting the fundamental right to travel).

176. *See* Zobel v. Williams, 457 U.S. 55, 69 (1982) (Brennan, J., concurring) ("[The Citizenship Clause] does not provide for, and does not allow for, degrees of citizenship based on length of residence."). *But see* Donahue, *supra* note *, at 471 ("Other scholars have interpreted this clause to mean that 'it is unconstitutional to deny benefits to new citizens that are extended to other citizens similarly situated—subject only to reasonable assurances that claims of new residence are bona fide.'") (quoting William Cohen, *Discrimination Against New State Citizens: An Update*, 11 CONST. COMMENTARY 73, 79 (1994)).

177. *But see* William Cohen, *Discrimination Against New State Citizens: An Update*, 11 CONST. COMMENT. 73, 74 (1994) (arguing that the confusion surrounding durational residency requirement cases should be resolved by deciding the cases using the Citizenship Clause of the Fourteenth Amendment); *see also id.* at 78 ("These [durational residency requirement cases] should be easy cases. They are not because they have been viewed through the Byzantine lens of equal protection doctrine, and not as a straightforward application of the Fourteenth Amendment's Citizenship Clause.").

178. *See* Hartch, *supra* note 159, at 477 ("If a broad right to travel is going to be adopted, the justification must rest on either moral or prudential grounds.").

179. *See id.* at 477-78 ("Even on these terms [moral or prudential grounds], however, the argument falls short . . . individuals may have a natural right to move from one place to another unimpeded. However, this right does not translate into an entitlement to welfare or housing every time one decides to move from state to state.").

right to travel as the basis for striking down durational residency requirements.[180] Hartmann suggests that the *Shapiro* line of cases could be read as being in line with "cases [in which] the Court has upheld public-assistance programs that merely refused to subsidize the exercise of constitutionally protected, fundamental rights," and that if the burden of durational residency requirements is not so great as to actually prevent a person from relocating, then durational residency requirements should be deemed constitutional.[181] Hartmann states:

> [S]ome [durational residency] 'requirements . . . may not be penalties upon the exercise of the constitutional right of interstate travel.' Although Justice Brennan did not intimate [that a welfare durational residency requirement] might be such a requirement, if . . . the cost of such a condition does not exceed the cost of . . . the right to 'migrate, resettle, find a new job, and start a new life' and the requirement's effect is thus to merely refuse to subsidize and not to penalize the exercise of that right, then such a residency-requirement condition is constitutional.[182]

Hartmann likens durational residency requirements cases to two other situations—abortion[183] and procreation,[184] in which he argues the Court "merely refused to subsidize" the exercise of fundamental rights through benefit programs.[185] He maintains that, like limitations on assistance program funds for abortion, or to support families with numerous children, durational residency requirements on welfare benefits simply refuse to provide public funding for interstate migration, rather than constitute a penalty against the right.[186]

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180. *See* Michael E. Hartmann, *Tiers for Fears, Fears of Tiers*, 40 WAYNE L. REV. 1401 (1994).

181. *Id.* at 1445.

182. *Id.* at 1475-76.

183. *See id.* at 1445-52.

184. *See id.* at 1453-63.

185. *Id.* at 1445 (asserting that the Supreme Court's reasoning in its line of durational residency requirement cases is consistent with cases in which "the Court has upheld public-assistance programs that merely refused to subsidize the exercise of constitutionally protected, fundamental rights"). Specifically, he cites *Lyng v. Castillo*, 477 U.S. 635 (1986) (concluding that the Federal Food Stamp Act's limitations on benefit increases for growing households did not constitute a penalty); *Harris v. McRae*, 448 U.S. 297 (1980) (upholding the Hyde Amendment, which prohibited states from allowing Medicaid funds to be used for any abortion); *Maher v. Roe*, 432 U.S. 464 (1977) (holding that Connecticut's refusal to use Medicaid funds to pay for abortions that were not medically necessary did not constitute a penalty upon a constitutional right); and *Dandridge v. Williams*, 397 U.S. 471 (1970) (upholding Maryland's cap on welfare benefits a family could receive, regardless of number of children, because it did not constitute a penalty).

186. *See* Hartmann, *supra* note 180, at 1464-74 (utilizing a complicated

The cases to which Hartmann analogizes are distinguishable in several respects from the durational residency requirement cases facing the states and the Supreme Court today.[187] Nevertheless, his analysis points to some of the less-recognized precedential dangers of using the traditional constitutional right to travel in deciding durational residency requirement cases.[188]

C. Alternative Approaches: Indigent Newcomers as a Suspect Class

Some theorists have attempted to avoid the difficulties inherent in applying the constitutional right to travel, and simply label indigent newcomers as a suspect class.[189] Legislation affecting indigent newcomers would then be subject to strict scrutiny regardless of whether it touched on fundamental rights.[190] The requirements for being classified as a suspect class are that the class be a discrete and insular minority,[191] lack real differences from other groups, have experienced historical discrimination, be politically disenfranchised, display characteristics which are immutable, and be susceptible to the risk of stigma.[192] These requirements are difficult to apply to the class of indigent newcomers; indigency, unlike other characteristics, is not easily identifiable.[193]

At least one commentator, Matthew Poppe, has offered a

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mathematical formula to determine the cost and subsidization of the interstate migration of indigents).

187. For example, the economic factor and the fundamental right in question in the cases noted above, *see supra* note 185, are more interconnected than are the denial of welfare benefits based on length of residency and the right to travel. As Hartmann himself points out, "*Shapiro* and *Maricopa County* did not hold that States would penalize the right to travel interstate by refusing to pay the bus fares of the indigent travelers." Hartmann, *supra* note 180, at 1446.

188. Namely, the viewpoint that what constitutes an impermissible penalty on the right to travel can always be determined through strict economics. *See* Hartmann, *supra* note 180, at 1464-74 (applying a mathematical formula to determine what constitutes a penalty on the right to travel).

189. *See* Thomas R. McCoy, *Recent Equal Protection Decisions—Fundamental Right to Travel or "Newcomers" As a Suspect Class?*, 28 VAND. L. REV. 987, 1016-17 (1975).

190. *See id.*

191. *See* United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

192. *See* Poppe, *supra* note 155, at 308-15.

193. *See, e.g.*, Donahue, *supra* note *, at 471 ("Although [newcomers] are typically a minority, they are by no means 'discrete and insular.'").

unique solution to these difficulties by suggesting that indigent newcomers be recognized as a *quasi*-suspect class.[194] Poppe first discards the possible justifications for a constitutional right to travel.[195] He then argues that indigent newcomers should be considered a quasi-suspect class, so that durational residency requirements would be subject to intermediate scrutiny, "a form of heightened scrutiny that takes into account the special characteristics of poor newcomers while recognizing that they do not warrant the strict scrutiny protection afforded to traditionally suspect classes."[196] Poppe defines a quasi-suspect class as "a class that shares many, if not all, of the relevant characteristics that give racial and national groups their suspect nature."[197] Indigent newcomers, argues Poppe, meet each of the requirements for a suspect class at least well enough to be classified as a quasi-suspect class.[198]

III. Analysis

A. Reliance on a Constitutional Right to Travel Is Flawed

One of the greatest weaknesses of *Shapiro*, *Saenz* and the other durational residency requirement cases is their reliance on the constitutional right to travel. Justice Brennan's structuralist approach is conclusory at best[199] because he relies on no passage in the Constitution that either explicitly or implicitly recognizes a right to travel.[200] Rather, he simply states that since such a right has always been recognized, the Court should continue to

194. *See generally* Poppe, *supra* note 155.

195. *See id.* at 303-07 (tracing the controversial history of the constitutional right to travel).

196. *Id.* at 308.

197. *Id.*

198. *See id.* at 314-15 (stating that the class of indigent newcomers has more in common with groups that have been granted quasi-suspect status than with those groups which have been denied the status). For examples of cases in which the Supreme Court has granted quasi-suspect status to a class, see *Mills v. Habluetzel*, 456 U.S. 91, 97-102 (1982) (applying intermediate scrutiny and holding that Texas' method of determining paternity deprived illegitimate children of Equal Protection) and *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724-25, 733 (1982) (applying a form of intermediate scrutiny and holding that denying males enrollment in School of Nursing violates Equal Protection). For an example of a case in which the Supreme Court has denied a class quasi-suspect status, see *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 432-33 (1985) (declining to classify the mentally retarded as a quasi-suspect class).

199. *See supra* notes 156-159 and accompanying text (discussing the structural approach utilized in *Shapiro*).

200. *See id.*

recognize it.[201]

Justice O'Connor's justification for the right to travel, based on the Comity Clause, is similarly flawed.[202] As mentioned in Part II, the Comity Clause is also known as Article Four's Privileges and Immunities Clause.[203] The difficulty with finding a right to travel in this clause is that the clause was designed to protect citizens from one state traveling through another state.[204] It was not designed to protect a citizen who has settled in a new state from actions taken against her by that state.[205] Therefore, any right to travel that is predicated on the Comity Clause will be a right limited to travel *only*. The Court itself has not applied the "right to travel" in such a restricted manner.[206]

Finding a right to travel in either the Privileges and Immunities Clause[207] or the Citizenship Clause[208] also strains the language of those passages. The dilemmas in placing a right to travel in the Privileges and Immunities Clause are the same as those for the Comity Clause. The Citizenship Clause merely extends United States citizenship to citizenship of the state in which a person resides.[209] It does not specify what rights a person has when she moves from one state to another.[210] Chief Justice Rehnquist points out as much in his dissenting opinion in *Saenz*.[211] Indeed, Rehnquist considers deriving a right to travel from the Fourteenth Amendment to be even more absurd than deriving such a right from the Comity Clause.[212] The Chief Justice is unwilling to make the leap of faith necessary to see a right to travel in the Fourteenth Amendment:

> [I] cannot see how the right to become a citizen of another

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201. *See id.*

202. *See supra* notes 160-162 and accompanying text.

203. *See supra* note 160 and accompanying text (discussing the Comity Clause).

204. *See supra* note 162 and accompanying text (discussing the flaws associated with using the Comity Clause to ratify a right to travel).

205. *See id.*

206. *See, e.g., Shapiro*, 394 U.S. at 634 ("[I]n *moving* from State to State . . . appellees were exercising a constitutional right."[emphasis added]).

207. *See supra* notes 163-166 and accompanying text (discussing the Privileges and Immunities Clause).

208. *See supra* notes 174-177 and accompanying text (discussing the citizenship Clause).

209. *See supra* note 174 (quoting the language of the Citizenship Clause).

210. *See id.*

211. *See* Saenz v. Roe, 119 S.Ct. 1518, 1530-35 (1999) (Rehnquist, C.J., dissenting).

212. *See id.* at 1531 ("I . . . have no difficulty with aligning the right to travel with the protections afforded by the Privileges and Immunities Clause of Article IV, §2 [the Comity Clause] . . . .")(Rehnquist, C.J. dissenting).

> State is a necessary 'component' of the right to travel, or why the Court tries to marry these separate and distinct rights. A person is no longer 'traveling' in any sense of the word when he finishes his journey to a State which he plans to make his home.[213]

Granted, the Chief Justice does not leap to mind as an example of an advocate for welfare rights. Therefore, his position may appear tainted by his views on welfare rights in general rather than based on his commitment to a constitutional right to travel.

A fundamental right to interstate migration *does* seem in line with the basic tenets of this country's creation. However, for whatever reason, the framers did not explicitly include the right in the Constitution, and one does not need to be a strict literalist to have difficulty finding the right to travel stated *implicitly* anywhere in the Constitution. Although it did not stop them from holding that a constitutional right to travel exists, even the majority in *Saenz* admits that "[t]he word 'travel' is not found in the text of the Constitution."[214]

Identifying a justification for a constitutional right to travel may be noble and even necessary. However, when something crucial to citizens' everyday survival, such as welfare benefits, hangs on the existence of such a right, the search for a justification must be suspended in favor of more effective and straightforward ways to deal with the issue. The Supreme Court must provide lawmakers with a more credible justification than the constitutional right to travel if it truly wishes to deter the enactment of future durational residency requirements for welfare benefits.[215] Even after *Shapiro*, a constitutional right to travel and strict scrutiny did not stop Congress from enacting PRWORA or the states from developing brand new durational residency requirements. Returning to the same faulty logic in *Saenz* does little to halt the vicious cycle of ever-more creative ways to deny indigent persons welfare benefits.

B. Will the Court Create a New Quasi-Suspect Class?

Poppe's suggested alternative to using the constitutional right to travel as a basis for deciding durational residency

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213. *Id.*

214. *Id.* at 1524.

215. *But see* Donahue, *supra* note *, at 484 (arguing that the most prudent thing for the Court to do once the issue of durational residency requirements comes before it again is simply to apply and reinforce the reasoning of *Shapiro*).

requirements does not help matters.[216] Even Poppe himself concedes that the class of indigent newcomers only nominally fits the requirements for quasi-suspect status,[217] and that the determination of "how much is enough" to qualify as a quasi-suspect class is left entirely to the discretion of the Court.[218] To date, the Supreme Court has afforded quasi-suspect status to only gender[219] and illegitimacy.[220] After the Court declined to designate as quasi-suspect such classes as the mentally challenged,[221] which appears to almost meet the requirements for a suspect class, it seems unlikely that the Court will extend the protection of quasi-suspect classification to indigent newcomers. Poppe rebuts this argument by asserting that "the Court did not extend heightened review to the mentally retarded because 'legislation singling out the retarded for special treatment reflects the real and undeniable differences between the retarded and others.'"[222] However, even if this is recognized as a valid argument, lack of real differences is the only requirement for classification as a suspect class that the mentally challenged arguably did not meet. Indigent newcomers, in contrast, do not readily meet any of the requirements. The Court is not as predisposed as Poppe to fit indigent newcomers into the mold of a quasi-suspect class. [223]

C. Rational Basis Reconsidered

There is an extreme urgency to the issue of durational residency requirements as they relate to welfare benefits. This is

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216. *See supra* note 194-198 and accompanying text (discussing Poppe's approach).

217. *See* Poppe, *supra* note 155, at 314-15 (stating that the class of indigent newcomers merely has more in common with groups already afforded quasi-suspect status than with groups who have been denied quasi-suspect status).

218. *See id.* at 314 ("It is . . . impossible to predict with confidence how the Court will rule in an individual case [in which quasi-suspect status is at issue].").

219. *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724-25, 733 (1982) (applying a form of intermediate scrutiny and holding that denying males enrollment in School of Nursing violates Equal Protection).

220. *See, e.g.*, Mills v. Habluetzel, 456 U.S. 91, 97-102 (1982) (applying intermediate scrutiny and holding that Texas' method of determining paternity deprived illegitimate children of Equal Protection).

221. *See* Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 432 (1985) (declining to classify the mentally retarded as a quasi-suspect class).

222. Poppe, *supra* note 155, at 312 (quoting *Cleburne*, 473 U.S. at 442-44).

223. This Article disagrees with Poppe on the feasibility of indigent newcomers being classified as a suspect class; therefore, it is unnecessary to delve into Poppe's analysis of durational residency requirement litigation under intermediate scrutiny. *See* Poppe, *supra* note 155, at 317-23.

not the kind of litigation where the people affected can await the result of numerous appeals. When an individual or a family is deprived of full welfare benefits for even a month or two, the consequences can be severe, even deadly. Contrary to general public opinion, it is difficult enough to survive on full welfare benefits, let alone reduced ones.[224] The Court needs to set out a straightforward standard for durational residency requirements for welfare benefits that can be easily interpreted by Congress and the state legislatures, and readily applied by the state courts. Ironically, the Court may be able to send the strongest message by using the most relaxed scrutiny.

The *Saenz* Court should have abandoned the constitutional right to travel as a justification, and explicitly decided durational residency requirement cases under equal protection, using a rational basis standard of review.[225] By basing durational residency requirement decisions solely on the doctrine of equal protection, and applying minimal scrutiny accordingly, the Court would have avoided the inherent problems in applying the troublesome constitutional right to travel.[226] Furthermore, the Court would ultimately provide better protection to indigent persons than a questionably fundamental right.

Indeed, there were signs that the Court would make such a change with *Saenz*. In its more recent durational residency requirement decisions prior to *Saenz*, the Court had been moving away from strict scrutiny and toward a rational basis standard of review:

> [T]he Supreme Court has appeared to subtly move away from

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224. *See Maldonado*, 177 F.R.D. at 317-18 (describing the challenges facing the Maldonados as they try to survive on *either* full *or* decreased benefits).

225. The rational basis test is the traditional standard of review for equal protection cases not involving a fundamental right or a suspect or quasi-suspect class. *See* JOHN E. NOWAK ET. AL., CONSTITUTIONAL LAW § 14.3, at 529-30 (3d ed. 1986).

226. *But see* Adler, *supra* note 25. Although Adler's analysis is technically applicable only to noncitizens of a state, rather than newcomers, it is instructive because most state legislatures seem to view indigent newcomers as noncitizens and freeloaders. Adler argues that state legislators owe a "general duty of impartiality" to outsiders. *Id.* at 391. He goes on to clarify that impartiality is not the same thing as, but rather an alternative to, equal treatment. *See id.* at 394. "Because state citizenship is not an empty concept, noncitizens do not have a general right to equal treatment." *Id.* at 398. Adler's analysis points to some of the pitfalls of adhering to equal protection rather than the constitutional right to travel in durational residency requirement cases. *See id.* However, it is unlikely that the Court would adopt a line of reasoning such as Adler's when applying equal protection to indigent newcomers. Nevertheless, Adler's brand of logic is instructive when considering the viewpoint of the general public towards new residents who are also would-be welfare recipients.

> Shapiro's fundamental rights analysis. Indeed, no majority of the Court has used *Shapiro*'s strict scrutiny since *Maricopa*, and the Court has moved towards something of a rational review test in right to migrate cases.[227]

Right to travel jurisprudence had been repeatedly referred to as "fractured;"[228] one commentator remarked that "[t]he four opinions in *Zobel* provide clear evidence of the Court's fractured view of right to travel cases."[229] Scholars also predicted that *Shapiro* would be limited the next time the issue of durational residency requirements reached the Court,[230] and that "current social and political conditions render inevitable a reconsideration of right to travel jurisprudence."[231] However, the Court did not seize the opportunity in *Saenz* to change its analysis of durational residency requirements, as some had predicted it would.

The Court has approached all durational residency requirement litigation as right to travel cases. However, even though there is no constitutional right to welfare benefits, cases involving welfare benefits should be considered a cohesive, distinct group. The Court has generally used minimum scrutiny in welfare litigation that does not involve durational residency requirements.[232] Even if the Court chooses not to alter its level of review in all durational residency requirement cases, it at least makes sense for it to do so in cases involving welfare benefits.

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227. *Maldonado*, 177 F.R.D. at 326.

228. *Maldonado*, 177 F.R.D. at 323 ("[T]he modern 'right to travel' jurisprudence [is] an area of jurisprudence that is unsettled and clearly in need of clarification by the United States Supreme Court. However, this Court cannot await a clarifying decision by the Supreme Court but rather this Court must attempt to apply this fractured area of law to the facts of this case.").

229. Donahue, *supra* note *, at 465. *See also* Zobel v. Williams, 457 U.S. 55, 56 (1982).

230. *See, e.g.*, Binns, *supra* note 9, at 1273-74 (1996). Binns gives three possible routes the Court might take when faced with a new durational residency requirement case. First, she says, the Court could simply overrule *Shapiro* and hold that using durational residency requirements to deter the migration of indigent persons is constitutional. Second, the court could find that some durational residency requirements do serve a compelling state interest. Third (and the possibility Binns considers most likely), the Court could find that durational residency requirements do not impinge on the right to travel at all, and are therefore permissible. *See id.*

231. *Id.* at 1266 (pointing to a recent trend in the judiciary back towards formalism).

232. *See Maldonado*, 177 F.R.D. at 323 ("[T]here is no constitutional right to public welfare assistance, and therefore a constitutional challenge to classifications created by a state's welfare statute, standing alone, is subject to rational basis review.") (citing Dandridge v. Williams, 397 U.S. 471, 485 (1970)); *supra* notes 128-141; *see also* Binns, *supra* note 9, at 1263-64 (discussing the effect of *Dandridge* on welfare litigation).

Rational basis review becomes advantageous, rather than ominous, for welfare rights supporters when it is considered in a new light.

It is conceivable that the rational basis standard of review for welfare durational residency requirement cases would not look like the traditional rational basis test. The Court could apply a "heightened" form of rational basis review. As one scholar said, "although the [*Zobel*] Court purported to apply rational basis review, its standard . . . [was] more [like] rational basis with a bite."[233] Other observers have also discussed the Supreme Court's use of an enhanced form of rational basis review,[234] "enhanced" primarily because in *Zobel*, the Court used rational basis review to *strike down* a state statute. Experience reveals that generally, once the Court decides to apply minimal scrutiny, a state statute is nearly invincible.[235] Perhaps it is a new way of applying rational basis review that makes it possible for the Court to use this standard to declare a state statute unconstitutional. Or

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233. Donahue, *supra* note *, at 464. At least one state has ventured into the realm of enhanced rational basis review as well when dealing with its state equal protection clause. *See supra* note 119 and accompanying text.

> Since the early eighties, this court has, in equal protection cases, articulated a rational basis test that differs from the [usual] federal standard, requiring: (1) the distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; and (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.

State v. Russell, 477 N.W.2d 886, 888 (Minn. 1991) (citing Wegan v. Village of Lexington, 309 N.W.2d 273, 280 (Minn. 1981)); *see also* Mitchell v. Steffen, 504 N.W.2d 198, 209 (Minn. 1993) (Tomlajanovich, J., dissenting) (suggesting that Minnesota has recognized a heightened rational basis test for nearly half a century, since *Loew v. Hagerle Bros.*, 33 N.W.2d 598 (Minn. 1948)). *But see* McKnight, *supra* note 119, at 735 (arguing that the Minnesota rational basis review standard is flawed, McKnight states that "in each case the court independently determined whether the resulting statutory balance was satisfactory . . . , this practice places great strain on the courts, statutory law, and constitutional theory.").

234. *See* Donahue, *supra* note *, at 464; *see also Maldonado*, 177 F.R.D. at 327 ("[T]he Court appears to have established a different test, in the framework of Equal Protection, to use in deciding right to travel cases. The Court has created a rational basis review that has more punch than the typical rational review test."); *supra* notes 128-141.

235. *See* RONALD D. ROTUNDA ET AL., 2 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.3, at 322 (1986) (citing Tussman and tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 366 (1949)) ("The United States Supreme Court attempts to meet these difficulties by maintaining that it is not its function, as it reviews legislation, to substitute its views about what is desirable for that of the legislature.").

perhaps there are some state statutes that are so egregiously against constitutional commands that they cannot be tolerated, even under minimal scrutiny. Durational residency requirements for welfare benefits certainly seem to fit into the latter category.[236] Achieving this message through rational basis review, however, depends on how the argument is framed.

If the Court does apply rational basis review to durational residency requirements, it must send a clear message it does not intend to make it easier for states to enact such laws. To the contrary, the Court must be careful to send the message that in applying rational basis review, it is stating that these requirements *do not even meet the test of rationality*. The key to the Court effectively transmitting this message is to give specific examples of purposes asserted by the states for durational residency requirements and explicitly state that they are *not* legitimate (being careful to explicitly state that it is not an *exclusive* listing of illegitimate state purposes). In fact, the Court began to do this in *Shapiro* before it moved to its discussion of the constitutional right to travel and its application of strict scrutiny.[237]

The straightforwardness of rational basis review is perhaps its most appealing quality in the area of durational residency requirements for welfare benefits. Due to the seriousness of the issue, as well as Congress' and state legislatures' history of rebellion against the Court on this issue, there is a distinct need for the Court to "cut states off at the pass,"[238] so to speak: "[S]tate

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236. This Article does not mean to suggest that the Court would be creating a completely new standard of review by continuing in the vein it began in *Zobel*. The Court is as likely to create an entirely new standard of review—"rational basis with a bite"—as it is to create a new quasi-suspect class. Rather, this Article simply suggests that rational basis review does not produce the same result in every case.

237. *See* Shapiro v. Thompson, 394 U.S. 618, 638 (1969) ("[E]ven under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the State for one year would seem irrational and unconstitutional."); *supra* notes 13-62 and accompanying text.

238. Furthermore, the Court needs to cut voters off at the pass, because voters are (at least theoretically) the ones who fuel the state legislatures. *See* Binns, *supra* note 9, at 1281.

> [My argument] does not assert that the Supreme Court, or courts in general, should function as a super-legislature, nor does it assert that legislators and voters make irrational choices. Rather, the argument acknowledges that under some circumstances, voters make a rational choice to remain uninformed. The individual voter assesses the costs associated with becoming informed, and the benefits that are likely to result. If the costs are too great, or the benefits too attenuated, the voter will choose to remain uninformed. This 'rational ignorance' is confounded when local governments choose local, short-term gains (fewer welfare recipients in Wisconsin) despite the long-term negative effects (more

legislators and politicians are likely to push the constitutional limit.... Although the Welfare Reform Act places greater responsibility on individual states to fight the battle against poverty, it does not necessarily give states any more resources with which to fight."[239] In other words, states consider themselves in a desperate situation (although arguably not quite as desperate as that of the welfare recipients they are trying to avoid serving)[240], and will likely try anything to avoid becoming a "welfare magnet." The Court needs to adopt an analysis that does not rely on an enigmatic constitutional right, such as the right to travel, to strike down durational residency requirements.

It could be argued that if the Court applied rational basis review to durational residency requirement cases, it could trigger a new "race" in which states attempt to create less and less invidious durational residency requirements. However, the durational residency requirement in *Saenz* is already fairly minimal.[241] If the Court had struck down *Saenz*'s requirement using rational basis review, it is unlikely that states could have devised a less intrusive requirement that would maintain any degree of effectiveness.

Conclusion

Rational basis review may not be the ideal approach to welfare litigation. Obviously, groups and individuals concerned with the dissemination of welfare benefits will instinctively want the receipt of those benefits to be protected by the most heightened judicial review possible. However, as mentioned above, there is no constitutional right to welfare benefits per se. The only way to subject legislation affecting welfare benefits to strict scrutiny is to link those benefits to some other fundamental right, such as the

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poverty nationwide). The Court, then, is in a unique position to prevent the future economic and social instability that could result from the choice to ignore the growing underclass.

Id. Although this rationale has been used to further the argument that the Court should apply strict scrutiny, it applies equally well to the argument that the Court should adopt rational basis review.

239. *Id.* at 1268.

240. Justice Stevens points out in *Saenz* that California could achieve the same $10.9 million savings it claimed its durational residency requirement was meant to achieve by simply deducting 72 cents across the board from each welfare recipient's monthly benefits. *See* Saenz v. Roe, 119 S.Ct. 1518, 1528 (1999).

241. *See Roe v. Anderson*, 134 F.3d 1400, 1401 (9th Cir. 1998) (describing the durational residency requirement involved as one which limits new residents' benefits for the first year they live in California to the amount they would have received in their prior state of residence).

right to travel. The right to travel, though, is premised on extremely shaky grounds, and the Court appears to be moving away from deciding durational residency requirement cases based on such a right. Establishing a firm ground on which to base durational residency requirement decisions, even if that ground involves less strict judicial scrutiny, is preferable to continued reliance on a so-called fundamental right whose origins are, at best, ephemeral. Indeed, strict scrutiny did not prevent Congress or the states from rolling over *Shapiro*. It seems unlikely that it will stop them from challenging *Saenz* as well. If the Court does not have to stretch, if it is able to simply say that restricting welfare benefits with durational residency requirements can never have a rational purpose, then it may send a stronger and more definitive message to both Congress and the states. Although a right to welfare benefits cannot be found anywhere in the Constitution, there are certain measures that basic human rationality will not allow. Depriving persons of the means for survival should be one of those measures.